In any trial before a jury, it is not required that the judge should be a mere presiding officer. As a matter of necessity he has certain discretionary powers whereby he may aid in bringing about speedy and accurate results. In him is vested an initiative which allows him, if necessary, to clear up, by means of judicious questioning, points of fact for presentation to the jury. Just how far a justice may thus actively interpose in the conduct of a trial cannot be determined by hard and fast rules. To bind him too closely is as fatal to beneficial results as to recognize no limits whatever to his power of initiative. It is, therefore, a question of degree upon which jurisdictions differ. The English practice allows the court considerable freedom, while some of our States closely restrict it, both as to summing up and also as to commenting on evidence during the trial.

It is clear, however, that a higher court must always have the power to prevent a straining of this initiative. In the principal case the facts undoubtedly show an extreme use of this discretionary power; for whatever may be its limits, it cannot be said to extend so far as to allow the Court to supplant the counsel for either side in the development of the case for the jury. *Wheeler* v. *Wallace*, 19 N. W. Rep. 33 (Mich.), recognizes such abuse of judicial discretion as a cogent reason for granting relief by a court of review. And a more recent case, *Dunn* v. *People*, 50 N. E. Rep. 137 (Ill.), objects in definite terms to examination of witnesses by the Court in criminal trials as prejudicial to fair results. The Court, therefore, in the present instance reaches a sound and just conclusion in holding this action reversible error.

PRIVILEGE OF WITNESSES WHO ARE PARTIES TO THE SUIT. — It seems to be an unsettled point in the law of evidence at the present time, as to just what is the effect of a claim of privilege by a party to the suit who has put himself on the stand as a witness in his own favor. Does he waive all his privileges by offering to testify, or, if not, can inferences be drawn against his case from his refusal to give all the evidence in his power? In the ordinary case, if a party to the suit can be shown to have withheld evidence of any sort bearing on the merits of the case without any excuse for its non-production, this is allowed to count heavily against him. *Wylde* v. *Northern R. R. Co.*, 53 N. Y. 156. But if he refuses to give further evidence on the ground of privilege, though logically there is a strong probability that he is keeping back the evidence because he knows that it would be harmful to his case, still on theoretical grounds this should cause no inferences to be drawn, for otherwise the privilege becomes a mere nullity. Indeed, this seems to have been the fundamental idea of a privilege, that the claim of it was perfectly proper and could never be used against the witness. *Rose* v. *Blakemore*, Ryan & Moody, 382.

From this point of view a recent Massachusetts case seems logically indefensible. The defendant called as a witness a former attorney of the plaintiff, and asked him as to certain confidential communications made to him by the plaintiff. On the claim of privilege by the attorney conducting his case, the court ruled that the plaintiff in person must assert or waive his privilege, and take the responsibility of it on himself. To avoid the inference that he was withholding evidence which might hurt his case, the plaintiff then waived his privilege, but took exceptions to the

ruling. The Supreme Court held, however, that there was no error, for while the plaintiff had not waived his privilege by going on the stand himself, yet even if he had refused to allow his attorney to testify, this would have been a proper subject of comment and inference by the jury. *McCooe* v. *Dighton R. R. Co.*, 53 N. E. Rep. 133 (Mass.).

It cannot be doubted, however, that the two positions taken by the court are logically inconsistent, for if the party still has his privilege, then no inferences should be allowed from his asserting it. This seems to be the English law to-day. *Wentworth* v. *Lloyd*, 10 H. L. C. 589; see also *Bigler* v. *Rehler*, 43 Ind. 112. In this country the point is not settled. In criminal cases there is a square conflict, some courts holding that the defendant waives all his privileges by going on the stand, and others that he waives none. Compare *Commonwealth* v. *Nichols*, 114 Mass. 285, and *Chesapeake Club* v. *State*, 63 Md. 446. In civil cases there seems to be very little authority on the point, and it is doubtful how far the principal case would be followed. While not logical, it takes, in the actual result reached, a convenient position between the two extremes of complete waiver of all privileges and waiver of none, with no inferences to be drawn. The party is protected in that he is not obliged to give evidence tending to incriminate himself, nor can his attorney without his consent give evidence which might subject him to a prosecution for perjury, and yet his opponent is not made to suffer by the exercise of this safeguard, and the merits of the case are made to appear directly or by a legitimate inference. For these practical reasons the decision seems satisfactory and may very probably be followed.

RECENT CASES.

AGENCY — INSURANCE POLICIES — WAIVER OF CONDITION. — An insurance agent accepted overdue premiums from the insured in several instances. *Held*, that forfeiture for non-payment of a premium when due may be thus waived although the policy expressly states that no waiver shall be valid unless in writing signed by an officer of the company. *James* v. *Mutual Life Assn.*, 49 S. W. Rep. 978 (Mo.).

A contrary result has been reached in the case of an express waiver, by an agent, on the ground that knowledge by the insured of the terms of his policy is to be presumed, and that therefore the principal cannot be held since the agent has clearly exceeded his authority. *Smith* v. *Niagara Ins. Co.*, 60 Vt. 682; *Quinlan* v. *Providence Washington Ins. Co.*, 133 N. Y. 356. The decisions in accord with the principal case do not question this well settled doctrine of agency, but either decide that such a restriction in a policy is inoperative because inconsistent with the rule of law that there may be a waiver by parol, or find an estoppel arising independently of the agent's authority. *Dwelling House Ins. Co.* v. *Dowdall*, 55 Ill. App. 622; 1 Joyce, Ins., § 439. The exact ground of the decision in the principal case is not clear, but it may well be supported on the second reason suggested. The insurer must have known of the overdue payment of the previous premiums, and having made no objection, should be estopped from insisting on the forfeiture.

AGENCY — UNAUTHORIZED CONTRACT — LIABILITY OF AGENT. — The defendant, as agent of R., entered into an unauthorized contract with the plaintiff, which R. repudiated. *Held*, that the defendant is liable to the plaintiff on an implied warranty of authority. *Cochran* v. *Baker*, 56 Pac. Rep. 641 (Oreg.).

The weight of authority is in favor of this view of the agent's liability as to unauthorized contracts. *Collen* v. *Wright*, 8 E. &. B. 647; *Baltzeu* v. *Nicolay*, 53 N. Y. 467. But as the point is a new one in Oregon, it is to be regretted that the court did not adopt a rule more in accord with the real nature of the transaction. It is hardly logi-